BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WILLIAM PETE TARNOWER Claimant VS. **NORTHROP GRUMMAN CORPORATION** Respondent AND **INSURANCE COMPANY OF STATE OF PENNSYLVANIA** Insurance Carrier	)	Docket No. 1,047,494

ORDER

STATEMENT OF THE CASE

Claimant requested review of the December 30, 2009, Preliminary Hearing Order entered by Administrative Law Judge Rebecca Sanders. Bruce Alan Brumley, of Topeka, Kansas, appeared for claimant. Christopher J. McCurdy, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that claimant had not proved by a preponderance of the evidence that he suffered an injury to his neck that arose out of and in the course of his employment. The ALJ further found that claimant had not proved that the alleged injury to his neck was a repetitive use injury. Last, the ALJ found that claimant had not proved just cause for extending his period for providing notice of his accidental injury from 10 days to 75 days. Accordingly, claimant's request for medical treatment was denied.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the December 29, 2009, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant requests review of the ALJ's finding that he did not prove he suffered a work-related injury when he was assaulted in respondent's parking lot by a coworker and the assault was related to his work. Claimant further contends he had just cause to extend the

period of time to give respondent notice of his accidental injury because he was afraid of being attacked again, he feared he would lose his job if he reported the assault and resulting injury, and he did not fully appreciate the permanency of his injury. For purposes of this appeal, claimant is not alleging that his injury is the result of a series of accidents or repetitive traumas. Claimant is relying on the evidence of a single trauma occurring on May 6, 2009.[1]

Respondent asks that the ALJ's Preliminary Hearing Order be affirmed. Respondent argues that claimant did not prove he was assaulted by a coworker in respondent's parking lot and did not prove that the alleged assault and injury were related to a harassment complaint he had previously filed against a coworker. In the event the Board finds claimant proved that he suffered an injury by accident that was related to his employment, respondent argues that claimant failed to provide timely notice of his accidental injury and had no just cause to extend the reporting period to 75 days. Further, respondent contends that claimant failed to relate his alleged injury to the alleged assault until 88 days after the incident, which is outside even the extended 75-day reporting period.

The issues for the Board's review are:

(1) Did claimant prove that he suffered personal injury from an assault that occurred May 6, 2009?

(2) If so, did claimant prove a nexus between the assault and his work at respondent?

(3) Did claimant give respondent timely notice of his alleged accidental injury?

FINDINGS OF FACT

Claimant worked for respondent as a computer analyst. He testified that on May 6, 2009, he was leaving work about 4:15 p.m. He was in respondent's parking lot speaking with a friend and coworker, Kevin Fajardo, when another coworker, Eddie Harper, came up behind him and put his hand on his neck. Claimant stated that Mr. Harper inserted his thumb and fingers deep into the back of his neck, "mutilating the nerves and the tissues--soft tissues in the back of my neck."[2] Claimant stated he believed Mr. Harper's action was intentional because he was hurt so severely.

Claimant claims Mr. Harper's action is connected to problems claimant was having with a coworker, Mitch Johnson. Claimant testified that Mr. Johnson had been harassing him

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[1] Claimant's Brief (filed Feb. 8, 2010) at 1.

[2] P.H. Trans. at 9.

for several years. Claimant said he had reported the harassment to his boss, Mr. Arnold, and to the human resources department. He stated that a few weeks before the May 6, 2009, assault, Mr. Johnson had told Mr. Harper to "take me [claimant] out."[3] He admitted, however, that he did not know whether Mr. Johnson and Mr. Harper were friends and it was only a possibility that was the reason for Mr. Harper's attack. Claimant also testified another possible reason for Mr. Harper's harassment was because claimant had written up one of Mr. Harper's friends two years earlier. However, he also stated that Mr. Harper had begun harassing him before he wrote up Mr. Harper's friend. Claimant also believed that both Mr. Harper and Mr. Fajardo were jealous of him because he made more money than they did.

Claimant first saw a medical provider for treatment of his neck problems on May 21, 2009, when he saw Dr. Huffman at Med Assist. He went to Med Assist two or three times. Med Assist's records of May 21 indicate that claimant reported that he was grabbed from behind and his neck was squeezed.

Claimant said he did not report the incident to respondent immediately because he was in shock. He was also worried about losing his job because he was afraid his boss, Thomas Arnold, would think he instigated the incident; he had previously been told he needed to get along with his coworkers; he was worried Mr. Harper might hurt him worse in retaliation if he reported the incident; and he did not realize the severity of his injury. Claimant stated he was a member of respondent's safety committee and as such was aware of his responsibility to report any injury immediately and to fill out an accident report.

Claimant said that Mr. Harper tried to grab his neck a second time two or three weeks after the May 6 incident, but claimant was able to block the attempt. Claimant testified that he and Mr. Harper work in different departments at respondent. Their only interaction at work would be if claimant went into Mr. Harper's department to photograph an item or take specifications of an item. Claimant would also see Mr. Harper in the hallways, during breaks and lunch periods, and in the parking lot coming to and leaving work. He said Mr. Harper would tease him about not working and therefore stealing money from respondent, but claimant also said that Mr. Harper did not know anything about claimant's job. He said Mr. Harper would come up to him in the hallway and pinch him, but he did not let anyone in management know he was having those problems with Mr. Harper.

Claimant said he finally reported his injury to Mr. Arnold on June 26, 2009. He testified he told Mr. Arnold that Mr. Harper and another employee, Chris Moore, were continuing to harass him and that Mr. Harper had intentionally hurt his neck on May 6, that he was still having neck pain, and that it was hard for him to do his work.[4] By that time, his neck pain had gotten progressively worse. Claimant testified that he did some lifting in his job. He said that there would be two or three items every couple of weeks that he would

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[3] P.H. Trans. at 14.

[4] P.H. Trans. at 19-20.

have to weigh and measure, and some of the items were heavy. He also testified that when working on the computer, he would have to rest his head on the back of the chair because his neck was hurting. He never told respondent that his job duties were causing his neck or shoulder to worsen.

Claimant's last day at work for respondent was on July 22, 2009, and he was told on July 24 that he was being laid off, along with about 28 other employees. He reported the May 6 incident to the sheriff's department on July 31, 2009. The sheriff's department investigated the report, but the district attorney's office has not pursued the case. On August 2, 2009, claimant sent an email to respondent's human resources department specifically reporting that he was intentionally injured on May 6, 2009, when his neck was squeezed by Mr. Harper. In that email, claimant asked for his injuries to be treated under workers compensation.

In a deposition, Mr. Harper denied he had grabbed claimant's neck on May 6, 2009. He said that although there is some joking, "sports jabs" and banging knuckles at work, he only does this with the buddies he socializes with outside work. He also said that claimant was a frail person and so would not be someone anyone would horse around with in that way. Mr. Harper was interviewed by a sheriff's officer after claimant made a complaint, at which time he stated that he did not believe he had touched claimant and that if he did, there had been no intention to hurt him. Mr. Fajardo, who claimant described as a good friend, was also interviewed by the sheriff's officer and said he never witnessed Mr. Harper touch or injure claimant.

Mr. Arnold testified that on June 26, 2009, claimant told him he thought he was being harassed by Mr. Harper and Mr. Moore. Claimant told him he felt threatened and that Mr. Harper grabbed at him or touched him in the hallway. He reported that Mr. Harper had squeezed his neck and he now had a pinched nerve for which he had seen a doctor. Mr. Arnold spoke with Mr. Harper and Mr. Moore, and both of them denied knowing what claimant was talking about. Mr. Arnold told the two employees if there was any teasing going on it had to stop. Mr. Arnold did not send claimant to a doctor because claimant presented the matter to him as a harassment problem, not as an accident. Claimant did not ask for medical treatment. Had claimant reported the incident as an accident, it would have started the workers compensation procedures.

Mr. Arnold was not aware of any problems between Mr. Harper and claimant before this June 26 conversation. Nor was he aware of any problems claimant had with Mitch Johnson. He was not aware of an incident where Mr. Johnson asked Mr. Harper to take claimant out.

Claimant was seen by Dr. Jennifer Clair on August 5, 2009, and by Dr. Travis Oller on October 7, 2009. At both examinations, claimant gave a history of being grabbed and squeezed on the back of his neck. He also told Dr. Oller that his left upper arm was also

squeezed, causing pain. Dr. Oller's medical note indicated that claimant "sustained an injury to his cervicothoracic region when he was attacked at work by a co-worker on May 6, 2009."[5]

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[6] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[7]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[8]

The Kansas Supreme Court has held that, for an accident to arise out of the employment, some causal connection must exist between the accidental injury and the

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[5] P.H. Trans., Cl. Ex. 2 at 3.

[6] K.S.A. 2009 Supp. 44-501(a).

[7] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[8] *Id.* at 278.

employment.[9] Fights between co-workers usually do not arise out of employment and generally will not be compensable.[10] If an employee is injured in a dispute with another employee over the conditions and incidents of the employment, then the injuries are compensable.[11] For an assault stemming from a purely personal matter to be compensable, the injured worker must prove either the injuries sustained were exacerbated by an employment hazard,[12] or the employer had reason to anticipate that injury would result if the co-workers continued to work together.[13]

K.S.A. 44-520 requires that "proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident . . . ." K.S.A. 44-520 further provides that notice may be extended to 75 days from the date of accident if claimant's failure to notify respondent under the statute was due to just cause. In considering whether just cause exists, the Board has listed several factors which must be considered:

(1) The nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually;
(2) whether the employee is aware he or she has sustained an accident or an injury on the job;
(3) the nature and history of claimant's symptoms; and
(4) whether the employee is aware or should be aware of the requirements of reporting a work-related accident and whether the respondent had posted notice as required by K.A.R. 51-13-1.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[14] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by

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[9] *Siebert v. Hoch*, 199 Kan. 299, 428 P.2d 825 (1967).

[10] *Addington v. Hall*, 160 Kan. 268, 160 P.2d 649 (1945).

[11] See *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 506-507, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

[12] *Baggett v. B & G Construction*, 21 Kan. App. 2d 347, 900 P.2d 857 (1995).

[13] *Harris v. Bethany Medical Center*, 21 Kan. App. 2d 804, 909 P.2d 657 (1995).

[14] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. __, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[15]

ANALYSIS AND CONCLUSION OF LAW

Even if claimant was injured as a result of an unwelcome touching or assault (grabbing of his neck) while in his employer's parking lot on May 6, 2009, there was no connection between this incident and work.[16] Furthermore, claimant admits he gave his employer no reason to anticipate any altercation would occur between claimant and Mr. Harper. Claimant has failed to prove that his injury resulted from the conditions or incidents of employment. The allegation that Mr. Harper was retaliating for claimant having reported Mr. Johnson for harassment is not persuasive. Likewise, the allegations that Mr. Harper may have been retaliating for something that happened two years earlier or out of jealousy about their pay are not persuasive. Accordingly, this Board Member finds that the incident did not arise out of the employment. The ALJ's denial of benefits is affirmed.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Preliminary Hearing Order of Administrative Law Judge Rebecca Sanders dated December 30, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2010.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Bruce Alan Brumley, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge

[15] K.S.A. 2009 Supp. 44-555c(k).

[16] Claimant does not allege the incident was horseplay.